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Evolution & the DUI

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Arizona DUI Updates

And Hot Topics

APAAC 2015 Summer Conference



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APAAC on Demand

- Basic Motion Practice
- Rule 404 Presentation
- Victim's Rights Enforcement
- Corpus Delicti Rule
- Fingerprint Analysis
- Search & Seizure for Traffic Cases
- Chemical Tests and Second Samples (DUI)
- Human Trafficking
- Auto Theft
- Forensic DNA Analysis
- Special Actions
- DUI (FSTs)
- ROC Main Program
- Human Elements
- AZ Compact

Rule Changes

Rule Change

- ▶ Memorandum Decisions may be cited for persuasive value, but only if:
 1. issued on or after 1/1/15
 2. no opinion adequately addresses issue before court &
 3. It hasn't been depublished
- ▶ Citation must indicate it's a memorandum decision
- ▶ Must provide either a copy or hyperlink
- ▶ No duty to cite to a memo decision

Rule 111(c), *Rules Supreme Ct.*

Out of State Memorandum Decisions

- ▶ Per Justice Pelander - May also be cited

Make Defense do it Correctly

- ▶ If defendant cites ensure:
 - After 1/1/15
 - No published opinion adequately addresses the issue
 - Not depublished
 - Indicated it is a memorandum decision
 - Provided a copy/hyperlink
- ▶ If rule not followed:
 - Call the defense on it!!
 - Move to strike

Example

State v. Chacon, No. 2 CA-CR 2014-0150
(App. filed May 28, 2015) Memorandum
Decision (copy attached).

- ✓ Issued after 1/1/15
- ✓ Indicates it's a memorandum decision
- ✓ hasn't been depublished
- ✓ provided a copy

Does a previous opinion adequately address
the issue(s) before the court ???

State v. Chacon,

► Issues

- Denial of motion to continue
- Notice of charges
- Denial of *Daubert* hearing
- Sufficiency of the evidence for (A)(3)
DUI charge

What Does This Mean for Minute Entries?

- Ethical opinion 87-14 relies on Rule 111(c)

Content of Complaints

- ▶ . . . The constitutional requirement that a complaint be made under oath is satisfied by an electronic oath or affidavit containing an electronic signature, made by a law enforcement officer or agency representative under penalty of perjury.
- b. Upon filing a charging document in a criminal case in which a defendant is charged with any offense listed in A.R.S. Title 13, chapters 14, 32, 35 or 35.1 or in which the victim was a juvenile at the time of the offense, the prosecuting agency shall advise the clerk that the case is subject to the provisions of Supreme Court Rule 123(g)(1)(C)(i)(h).
- ▶ Rule 2.3, *Rules of Criminal Procedure* (amendment)

Post-Conviction DNA Tests

Anyone convicted & sentenced for felony may petition court at any time for DNA testing of any evidence in possession or control of court or state, related to the investigation or prosecution that resulted in the conviction, & may contain biological evidence.

Rule 2.3, *Rules of Criminal Procedure* (amendment)

Grand Jury

- ▶ *Criminal Proc.* Rule 12.5 amended to allow an in-custody witness into grand jury proceedings with guard.

Motion to Vacate Judgment

- › Any time after entry of judgment & sentence, upon request of the State, Court may vacate judgment if:
 - 1) Clear & convincing evidence establishes defendant did not commit the offense
 - 2) Conviction was based on erroneous application of the law

Rule 2.3, *Rules of Criminal Procedure*
(amendment)

Rule Changes

- › Significant changes to *Rules of Civil Appellate Procedure*.
- › Numerous changes to *ethical rules* responding to changes in technology.
- › Changes to lawyer admission process.

Hot Case Law Topics

Fourth Amendment Opinions

Reminders

First Inquiry - Does 4th Amendment Apply?

- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?

If not - 4th Amendment does not apply

If yes - was it reasonable, is there a warrant exception?

4th Amendment Reminders

- Good Faith
- Mistake of fact & law
- Exclusionary Rule (suppression) is NOT automatic
 - *Herring v. US*, 555 U.S. 35 (2009).
 - If relying on overturned precedent - *Davis v. US*, 564 U.S. ____ (2011)
- Inevitable discovery. *State v. Rogers*, 216 Ariz. 555 (App. 2007)
- Look for no stop/seizure - *Robles*
- AZ no tougher than feds except for home searches

Voluntariness of Blood Draw

- Blood draw exception to warrant requirement [28-1388(E)] does not apply when person receives treatment against his/her will
- **NOTE:**
 - defendant repeatedly told deputy did not want transport for treatment
 - Deputy gave an ultimatum
 - Should be limited to State Action (*Estrada* also).

State v. Spencer, 235 Ariz. 496 (App. 2014).

Mistakes of Fact & Law

Can provide basis for a stop/seizure:

- If objectively reasonable
- Subjective understanding of officer is not examined

Helen v. North Carolina, 135 S.Ct. 530 (2014).

(Should also apply to other types of searches).

Good Faith Mistake of Fact

- Officer was aware of window tint statute but believed window was darker than allowed
- Court found this was a mistake of fact but – with *Helen* does not matter so much
- Inquiry is – was the officer's mistaken belief reasonable?
- Yes – tint was dark on sunny day, officer had been correct 99% of time

Use of Criminal History

- › Officer may rely in part on suspect's criminal history to form reasonable suspicion
- › Criminal history alone is never enough
- › Totality of the circumstances test
- › Def. driving rental car, no personal belongings, explanations were contradictory, extensive criminal record, unlabeled boxes packaged like drugs - this was enough

State v. Woods, 236 Ariz. 527 (App. 2015).

Possible "Innocent" Behavior

- › Reasonable suspicion does not require officer to rule out possible alternate, innocent explanations for observed conduct.
- › Court does not have to make such findings.

State v. Evans, No. CR-14-0285-PR (filed 6/4/15)

Terry Frisk at Traffic Stop

- › Traffic stops are not consensual
- › Dangerous portion of Terry's "Armed & Dangerous" test is not required for traffic stops
- › As long as officer has reasonable suspicion for the stop & suspect is armed

Gastelum v. Hegyi, (Montgomery, RPI) 711 Ariz. Adv. Rep. 4 (App. 2015).

Prolonging Stops – Dog Sniffs

- ▶ Police may not prolong a traffic stop for a dog sniff without reasonable suspicion
- ▶ Authority for the seizure ends when the tasks related to the stop (getting paperwork, check for warrants, etc.) are or should be complete
- ▶ Key issue – does the dog sniff prolong the stop

Rodriguez v. United States, 135 S.Ct. 1609 (2015).

Community Caretaking

- ▣ Exception to Warrant Requirement
- ▣ Good Opinions
 - *Becerra*
 - *State v. Organ*, 225 Ariz. 43 (App. 2010).
 - *State v. Mendoza-Rulz*, 225 Ariz. 473 (App. 2010).

Community Caretaking & Homes

- ▶ Community caretaking exception does not apply to search of homes
- ▶ Affirmed exigent circumstances & emergencies requiring immediate attention allow warrantless entry into homes

State v. Wilson, CR-2011- 01027 (Filed 6/3/15).

Follow-up From Last Year

- ▣ *State v. Jacot*, 235 Ariz. 224 (App. 2014).
 - Officer's observation of open front door allowed entry of home under community caretaking exception.
 - *Wilson* trumps
 - Note: COA in *Wilson* indicated *Jacot* correct under exigency theory
 - Careful with word choice – may want to bring multiple theories

DUI Opinions

Implied Consent Admonition

Reading "Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance . . ." to DUI suspect did not render consent involuntary.

2 to 1 decision

State v. Valenzuela, 713 Ariz. Adv. Rep. 12 (App. 2015).

Case to watch – *Anderson* (Division 1)

Rule 702 – Scottsdale Crime Lab

- ▶ Evidence is Suppressed under Rule 702(d) only if alleged flaw in the application of the methodology actually make the defendant's evidence unreliable.
- ▶ Mere fact the GC at times failed to produce readings did not mean those that were produced were inaccurate.
- ▶ No evidence "errors" affected defendant's tests
- ▶ *State presented evidence supporting the results*
- ▶ "Errors" go to weight, not admissibility
- ▶ *State v. Bernstein (Herman, RPI) 711 Ariz. Adv. Rep. 10 (2015).*

Retrograde Extrapolation

- ▶ Retrograde that did not use a full eating & drinking history was admissible under Rule 702

- ▶ *State v. Miller (Madrid, RPI) 234 Ariz. 289 (App. 2014).*

Blood Alcohol Results

- ▶ Expert who did not analyze blood sample may testify, in form of independent opinion, regarding blood results conducted by another.
- ▶ When testifying expert provides own opinion, this is witness defense has right to confront.
- ▶ Documents were used only for basis of opinion, not to prove their truth, so outside scope of Confrontation Clause.

State v. Karp (Vorls, RPI) 236 Ariz. 120 (App. 2014); State v. Pesqueira, 235 Ariz. 470 (App. 2014) .

Marijuana DUIs

Medical Marijuana

- ▶ Marijuana is not a defense under A.R.S. § 28-1381(D) to (A)(3).
- ▶ Neither A.R.S. § 36-2811(B) nor 36-2802(D) provide immunity to (A)(3) DUI charges.

Dobson v. McClennen (Mesa Pros, Office, RPI) 236 Ariz. 203 (App. 2014)(review granted).

Medical Marijuana

AMMA does not immunize a medical marijuana card holder from prosecution under A.R.S. § 28-1381(A)(3) even when drug is delta-9-tetrahydrocannabinol (THC), an active component of marijuana.

Darrah v. McClennen (Mesa Prosecutor's Office, RPI) 236 Ariz. 185 (App. 2014).

***Harris* & Rule 32**

- ▶ *Harris* metabolites (A)(3) opinion was not a significant change in the law
- ▶ Does not entitle one to relief under Rule 32.1

State v. Werderman, 713 Ariz. Adv. Rep. 23 (App. 2015).

Hot Topic – Vape Pens

- ▶ First generation e-cigarettes resembled a tobacco cigarette

Oxford Dictionary chose “Vape” as the 2014 Word of the Year.

Vape Pens

- › Used with hash oil, wax/concentrates & flowers
- › Typical odor is missing

Actual Physical Control

State v. Tarr, 235 Ariz. 288 (App. 2014).

State v. Tarr, 235 Ariz. 288 (App. 2014).

- › **HOLDING:** Defendant was not entitled to requested stationary shelter instruction
- › Defense stationary shelter jury instruction was a correct statement of law
- › *Zaragoza* instruction adequately instructs the jury on APC
- › Defense view – opinion says I get a stationary shelter instruction

Stationary Shelter

- Ct stated: Defendant's stationary shelter instruction was a correct statement of the law
- Court, found defendant not entitled to it & *Zaragoza* instruction is adequate
- Are comments *Dicta*?

Actual Physical Control

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.

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Compare *Love*

- This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired

Love, at 326.

- › *Zaragoza* specifically took the "stationary shelter" language out
- › *Zaragoza* = Supreme Ct.
- › *Zaragoza* says: "we believe that the following modified form of the RAJI should be used in future actual physical control prosecutions."
- › *Tarr* = Ct. of Appeals

- › *Zaragoza* came after *Love*
- › The *Zaragoza* instruction is the exact language from *Love* without that language
- › Supreme ct. obviously considered the issue and removed the stationary shelter language
- › Take copies of both opinions to court

Warn the court regressing and basing instructions on language from Ct. of Appeals Opinions.

Prepare & Propose APC Instructions

- › Definition of Drive [ARS 28-101(17)]
- › APC does not require proof the person intended to drive
- › NOT "stationary shelter" if danger exists (*Tarr*)
- › Circumstantial evidence of driving
- › APC/DUI can occur on private property

Review, Object To & Modify Proposed Defense Instructions

- › Change "threat to public" back to "danger to himself or others"

State v. Tarr, 235 Ariz. 288 (App. 2014).

- › "Imminent control" language in APC instruction was proper
- › Reiterated a suspect's purpose (whether to place vehicle in motion) is not relevant to the charge

State v. Tarr, 235 Ariz. 288 (App. 2014).

- Acknowledged State does not have to elect charges
- Circumstantial evidence of driving

State v. Tarr, 235 Ariz. 288 (App. 2014).

- "Imminent control" language in APC instruction was proper
- Reiterated a suspect's purpose (whether to place the vehicle in motion) is not relevant to the charge

Additional Opinions

Victim's Rights

- › No provision of Victim's Bill of Rights allows victim's counsel to substitute for prosecutor in restitution hearing
- › Substitution is not allowed


Lindsay v. Cohen (Meyn, RPI) 236 Ariz. 565 (App. 2015).

Judicial Notice on Appeal

- › Appellate Court cannot take judicial notice of a fact that is an element of an offense (whether underlying offense was a felony)
 - Jurors must determine whether evidence supported each element of an offense
 - Jurors do not have to accept judicially noticed fact as conclusive


State v. Rhome, 235 Ariz. 459 (App. 2014)



 **Defensive Driving School**


HB 2308

- Allows attendance at defensive driving school every 12 months (instead of 24).

 **Obstructing Highway; Public Thoroughfare**


SB 1063

- Added: intentionally activating pedestrian signal on a highway or public thoroughfare, if the person's reason is not to cross, but to stop passage of traffic & solicit a driver for donations or other purposes.

 **Motorcycles; All-Terrain Vehicles (Handlebars)**


HB 2345

Removed prohibition against positioning handlebars so hands of operator are above the shoulder height.

 **Motorcycles; All-Terrain Vehicles
(Seats)**

HB 2236


Prohibits more than one person on a motorcycle unless it is designed to carry more than one person.

 **Public Records - Victim Rights**

HB 2239


- Allows victim's attorney, on behalf of the victim, to get a free copy of police reports from investigating law enforcement.

(In addition to the victim and

 **Victim Rights**

HB 2203


- Allows victim's to get a free copy of any electronic recordings made during a postadjudication /post conviction release hearing.



Body Cameras Committee

SB 1300

Establishes 15-member Law Enforcement Study Committee to recommend policies & laws on use of law enforcement officer body cameras & recordings.



Agg Assault: Simulated Deadly Weapon

HB 2304

Now Aggravated Assault if person uses a simulated deadly weapon. Class 3 felony unless victim is under 15 (class 2).

Palcohol

- ▶ Governor vetoed bill
- ▶ Will likely see in Arizona
- ▶ Labs say will show up on breath/blood test & PBTs
- ▶ Not sure about odor

Additional Hot Topics

- ▶ Defense HGN "Study"
- ▶ 28-644 issues
- ▶ Liquid Mass Spec.



Thank You!

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